Supreme Court, U.S.
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No. 05-___

IN THE

Supreme Court of the United States

SFPP, L.P.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION;
UNITED STATES OF AMERICA; *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an agency can order a common carrier to pay damages for charging a rate the agency itself had previously prescribed?

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner SFPP, L.P. states that the following were parties to the proceeding in the United States Court of Appeals for the District of Columbia Circuit:

SFPP, L.P.
Federal Energy Regulatory Commission
United States of America
BP West Coast Products LLC
Texaco Refining and Marketing Inc. dba Equilon Enterprises, LLC
Tosco Corporation
Chevron Products Company
Ultramar Inc.
Navajo Refining Company, L.P.
ExxonMobil Oil Corporation
Valero Energy Corporation
Valero Marketing and Supply Company
ConocoPhillips Company
Western Refining Company, L.P.
Ultramar Diamond Shamrock Corporation

Pursuant to Rule 12.6, the same parties are parties in this Court. SFPP, L.P. is the petitioner and all other parties are respondents in this Court.

RULE 29.6 STATEMENT

The parent corporations of Petitioner SFPP, L.P., and the publicly held companies that own 10% or more of its stock, are:

Kinder Morgan Operating L.P. "D"
Kinder Morgan Energy Partners, L.P.
Kinder Morgan Management, LLC
Kinder Morgan G.P., Inc.
Kinder Morgan, Inc.

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PETITION FOR A WRIT OF CERTIORARI

SFPP, L.P. ("SFPP") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 374 F.3d 1263 and is included at App. 1a-79a. The unpublished orders of the court of appeals denying rehearing and rehearing en banc are reproduced at App. 148a-153a. The opinions of the Federal Energy Regulatory Commission ("FERC" or "Commission") are reported at 86 FERC ¶ 61,022; 91 FERC ¶ 61,135; 96 FERC ¶ 61,281; and 97 FERC ¶ 61,138. Relevant portions of those orders appear at App. 80a-102a, 107a-135a.

JURISDICTION

The decision of the court of appeals was entered on July 20, 2004. On October 4, 2004, the court denied timely petitions for rehearing and rehearing en banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Interstate Commerce Act ("Act" or "ICA"), as amended, are reproduced at App. 154a-162a.[1]

STATEMENT

This case presents a fundamental and important question of rate regulation: whether an agency, after having itself prescribed a rate, can declare that rate to be unreasonable and order the carrier to pay damages for shipments that moved under it.

FERC erred in answering that question in the affirmative. In the proceedings below, FERC held that certain SFPP rates were unjust and unreasonable, and ordered the common carrier to file reduced rates. Later, FERC found unreasonable the very rates it had prescribed, and ordered the carrier to pay damages for shipments that had moved under the prescribed rates. The court of appeals affirmed.

The decisions below are squarely contrary to *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284

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[1] The Interstate Commerce Act was recodified in 1978 and substantially amended in 1980 and 1995. However, oil pipelines continue to be regulated under the Act as it existed on October 1, 1977, as amended by Title 18 of the Energy Policy Act of 1992, Pub. L. No. 102-486. *See* App. 4a n.1. All references to the ICA are to the pre-1978 version, which can be found in 49 U.S.C. §§ 1-27 (1976) or, as reprinted, in 49 U.S.C. app. §§ 1-27 (1988).

U.S. 370 (1932). That case involved a challenge to an Interstate Commerce Commission ("ICC") ruling awarding damages to shippers on the ground that they had paid rates exceeding just and reasonable levels. *Id.* at 382. The ICC did so even though the rates charged were below levels the agency itself had previously prescribed. *Id.* at 382-83. This Court held that the carriers were entitled to rely upon the agency's prescription, and that the agency could not later ignore its order and conclude that the rates it had prescribed were "unreasonable" and subject to damages. *Id.* at 389. *Arizona Grocery* has been zealously guarded by decisions of this Court and the courts of appeals for more than seventy years.

Review is important because the decision below not only conflicts with decades of judicial precedent but also undermines the congressional scheme for rate regulation. Congress balanced the carrier's freedom to set rates in the first instance and the agency's oversight role. To do so, the statute provides two mechanisms for changing a carrier's rate, giving the agency specific but different authority with regard to each. FERC, which inherited the Interstate Commerce Act regulatory scheme from the ICC, has blurred the distinction between those two mechanisms and upset the careful balance Congress struck. This Court should act swiftly to prevent further damage to the statute, as it has long been interpreted and applied by the courts. These issues are important not only to oil pipelines but also to other industries that are regulated under statutes modeled on the Interstate Commerce Act.

A. Statutory Background

Part I of the Interstate Commerce Act, as amended, 49 U.S.C. §§ 1-27, applies to common carriers engaged in the interstate transportation of crude oil and petroleum products by pipeline. 49 U.S.C. § 1(1). It provides that "[a]ll charges

made for any service rendered or to be rendered in the transportation of passengers or property . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." 49 U.S.C. § 1(5).

Pipelines must file rate schedules with the Commission. 49 U.S.C. § 6(1). No carrier may ship oil by pipeline unless there is a rate on file for that movement, and no party may charge or pay anything other than the filed rate. 49 U.S.C. § 6(7). Because the Commission lacks authority to prescribe an initial rate on a new service, *see Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 311 (1975), all rates begin as carrier-made rates.

Although all rates begin as carrier-made rates, the ICA establishes two different methods for changing filed rates. The first is by unilateral action of the carrier. 49 U.S.C. § 15(7). FERC may suspend the carrier's proposed rate change for a maximum of seven months, pending an investigation into its lawfulness. 49 U.S.C. § 15(7). At the end of the suspension period, the carrier may put the new rate into effect unless, prior to that time, FERC has completed its investigation and affirmatively found the proposed rate to be unlawful. *Id.* FERC may require the carrier to keep an accounting of its collections under any carrier-initiated rate increase and, at the end of the investigation, order the carrier to make refunds if the rate is not justified. *Id.*

The second method for changing existing rates is by FERC prescription, either on the agency's own initiative or upon complaint pursuant to Section 13 of the Act.[2] 49 U.S.C. § 15(1). In order to change an existing rate, FERC or the complainant must prove that the rate is unjust and unreasonable, as well as what the just and reasonable rate

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[2] *See* 49 U.S.C. §§ 13(1) (complaints), 13(2) (Commission-initiated investigations).

would be. *Id.*; *see also Southern Pac. Co. v. ICC*, 219 U.S. 433, 443-44 (1911). Then, and only then, "the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate . . . to be thereafter observed in such case." 49 U.S.C. § 15(1).[3] Carriers are prohibited from publishing, demanding, or collecting any rate other than the rate so prescribed, *id.*, and are subject to substantial penalties if they do so. 49 U.S.C. § 10(1). Recognizing the legislative nature of prescribed rates, the ICC historically required carriers to petition the agency to vacate rate prescriptions and allow them to file changed rates. *See San Antonio, Texas v. Burlington Northern, Inc.*, 359 I.C.C. 1, 4-18 (1978); *see also* 49 U.S.C. § 17(9)(g) (standards for reopening and modifying orders).

FERC is authorized to award damages only where there has been a violation of the Act. Captioned "Liability for damages to person injured by violation of law," Section 8 provides that a "common carrier shall be liable . . . for the full amount of damages sustained in consequence of any such violation of provisions of this chapter." 49 U.S.C. § 8. Section 16(1) provides that, if, after a hearing on a Section 13 complaint, "the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay damages." 49 U.S.C. § 16(1). Damages awarded for the payment of existing rates found to be unreasonably high after proceedings under Section 15(1) are commonly known as reparations. *See Reiter v. Cooper*, 507 U.S. 258, 262 (1993).

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[3] A corollary of the Commission's authority to prescribe a reasonable rate is its lack of authority to prescribe an unreasonable rate: "it is precluded by the statute from fixing [a rate] which is unreasonable, which by the statute is declared unlawful." *Arizona Grocery*, 284 U.S. at 387.

B. Regulatory Background

Petitioner SFPP is a common carrier by pipeline that transports refined petroleum products—gasoline, diesel, and jet fuel. SFPP has two pipelines that serve Arizona. One originates in Los Angeles, California (the West Line); the other originates in El Paso, Texas (the East Line). App. 82a. These are the only pipelines that carry refined petroleum products into Arizona. A map showing SFPP's West and East Lines appears at App. 101a.

Beginning in 1992, shippers filed complaints under Section 13(1) of the Act challenging SFPP's carrier-made rates on the East Line. App. 86a-91a. This is the first complaint case that FERC has decided since inheriting jurisdiction over interstate oil pipelines in 1977, and FERC had no prior experience with the relevant provisions of the ICA. Historically, however, Section 13(1) has been "one of [the Act's] most frequently used provisions," *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979), and rate prescriptions can remain in effect for decades.[4]

In its January 1999 "Opinion No. 435," FERC held that SFPP's existing East Line rates were unjust and unreasonable. App. 81a, 98a-99a. Exercising its authority under Section 15(1) of the ICA "to determine and prescribe what will be the just and reasonable . . . rates . . . to be thereafter observed" following such a holding, FERC ordered SFPP to file reduced rates to be charged in the future on the East Line.[5] FERC gave SFPP specific instructions on how to

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[4] *E.g.*, *Southwestern Millers' League v. Atchison, T. & S. F. Ry.*, 364 I.C.C. 724, 724-26 (1981) (rate prescription in effect for 40 years); *Nueces County Navigation Dist. No. 1 v. Abilene & Southern Ry.*, 364 I.C.C. 269, 272-76 (1980) (20 years).

[5] "Within 30 days after this order issues SFPP shall file revised tariffs reflecting the changes to the calculation of its East Line rates required by this order . . . ." App. 99a.

calculate the new rates and directed that they should go into effect March 1, 1999.[6] Those new rates of necessity would apply to *all* shippers on the East Line, not merely those that had filed complaints. *See* 49 U.S.C. § 6(1). FERC did not even suggest in Order No. 435 that its rate prescription would be "interim" or "tentative." To the contrary, FERC stated that when the new rates took effect, the period for reparations would end, as it would with any rate prescription. App. 96a.

After SFPP complied, FERC accepted the revised rates but then suspended them "subject to refund, and to the outcome of the ongoing proceeding." App. 105a. That action had serious consequences for SFPP because it expanded SFPP's liability to *all* shippers in the event of further rate reductions. In subsequent orders on rehearing, FERC changed its mind on significant ratemaking issues and directed SFPP to file further revised rates based on those new rulings. App. 110a-112a (May 2000 order); App. 127a-128a (September 2001 order); App. 130a-135a (November 2001 order). The results were even lower rates, which FERC ordered to be made effective retroactively; FERC also ordered refunds to all shippers based on the difference between the Opinion No. 435 rates and those required by its later orders. App. 127a-128a, 146a-147a.

As FERC recognized, *Arizona Grocery* holds that when the rate charged has been set by the Commission itself, the Commission has no power to require reparations or refunds from that rate. 284 U.S. at 389-90; *see also* App. 146a. FERC, however, sought to distinguish *Arizona Grocery* by claiming that the rates it prescribed in Opinion No. 435 were merely interim ones pending final disposition on what the

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[6] 86 FERC ¶ 61,022, at 61,079-61,084 ("Rate Design Issues"); *id.* at 61,084-61,111 ("Cost-of-Service Issues"). FERC later extended that effective date to April 1, 1999. App. 102a.

maximum rate should be. FERC cited no authority to support its claim of authority to order retroactive relief from "interim" rate prescriptions. *See* App. 142a-146a.

C. Proceedings Below

On petition for review, the court of appeals upheld FERC's awards of retroactive relief from Commission-prescribed rates. App. 62a-66a. The court acknowledged the *Arizona Grocery* holding prohibiting "the retroactive revision of established rates through ex post reparations." 374 F.3d at 1304; App. 63a. However, it limited the *Arizona Grocery* rule to instances in which there was what it termed a "*final* Commission-approved rate." *Id.* (emphasis added). The court found that the rate orders in this case did not constitute rate prescriptions because instead of establishing final rates, FERC had accepted the rates it required SFPP to file and suspended them subject to refund.[7]

The court of appeals found that FERC has statutory authority to order interim prescriptive rates because the ICA does not expressly deny it such authority: "Yet nothing in Section 15(1) prohibits FERC from directing a pipeline to file an interim rate, subject to suspension and refund, if there is a possibility that the final rates will be lower than the interim rates." 374 F.3d at 1305; App. 66a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals flies in the face of the Interstate Commerce Act and is directly contrary to this Court's precedents. This Court has held that a rate prescribed by the Commission "has the force of a statute" and the Commission is devoid of power to order reparations or

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[7] "Thus Opinion No. 435 set no final rate; rather, FERC only established a final rate at the completion of the OR92-8 proceedings." 374 F.3d at 1304; App. 63a.

damages as the result of its being charged. *Arizona Grocery*, 284 U.S. at 384. The decision below, however, holds that carriers can be forced to pay damages from rates they filed and collected pursuant to an agency's rate prescription order. That ruling gives the agency authority that Congress plainly did not grant it in the statutory scheme and subjects carriers to liability Congress did not intend. It also does violence to the values of rate stability and fairness embodied in the statute.

This case raises questions of recurring importance for the oil pipeline industry. The decision below exposes common carrier pipelines to the ongoing threat of open-ended liability. The reparations issue presented here also arises in rate prescription cases under other federal statutes modeled on the ICA, such as the Federal Power Act, the Natural Gas Act, and the Federal Communications Act. This case is a particularly appropriate vehicle to consider this issue, in that FERC awarded retrospective relief from the prescribed rate not only to the original complainants but to *all* shippers on the East Line.

Because of the D.C. Circuit's preeminence in overseeing ratemaking by FERC and other federal agencies, consideration by other courts of appeals is not likely to resolve this issue. The D.C. Circuit was the forum for approximately 65% of appeals from FERC decisions commenced in the 12-month period ended June 2004.[8] Moreover, since *Arizona Grocery* was handed down in 1932, of the cases involving direct review of actions by rate-regulating agencies in which

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[8] In the twelve-month period ending June 30, 2004, 257 cases reviewing FERC orders were commenced in the courts of appeals. The District of Columbia Circuit was the forum for 162 of those cases. *See* Statistics of the Administrative Office of the United States Courts (2004). That court is also preeminent in hearing FCC cases, serving as the forum for 121 of 169 such cases (71.5%) in the same period. *See id.*

the court of appeals cited that decision, 72.5% were from the D.C. Circuit. For these reasons, immediate review by this Court is both appropriate and necessary.

I. PRIOR CONTROLLING DECISIONS OF THIS COURT AND THE PLAIN LANGUAGE OF THE INTERSTATE COMMERCE ACT REQUIRE REVERSAL OF THE DECISION BELOW

A. The Decision Below Conflicts With This Court's Precedents

The court of appeals held that a carrier can be liable in damages for movements under a rate prescribed by the FERC. That ruling cannot be reconciled with this Court's holding in *Arizona Grocery*.

The court below attempted to distinguish this case from *Arizona Grocery* based on the agency's assertions that its original rate prescription was not final. 374 F.3d at 1304-05; App. 63a-65a. The same argument was raised in *Arizona Grocery* itself. Indeed, the facts of *Arizona Grocery* are remarkably similar to those here.

In *Arizona Grocery* the ICC determined in 1921, after hearing on a complaint, that a rate of 96.5¢ was just and reasonable, and the carriers thereafter charged a rate of 96¢ or less. Three and a half years later, in February 1925, the Commission changed its earlier opinion based on new evidence, and found that the rate should have been 71¢. 284 U.S. at 381-82. Reparations were ordered for the difference between 71¢ and what the carriers had charged over the intervening 3-1/2 year period. The ICC asserted that that its original rate prescription was subject to modification:

> We reserve the right, upon a more comprehensive record, to modify our previous findings, whether in the same or a previous case, upon matters directly in issue before us . . . . We have such a case here. For the first

> time the record before us is comprehensive in the evidence which it contains bearing upon the reasonableness of the rates assailed.

Traffic Bureau of Phoenix Chamber of Commerce v. Atchison, Topeka & Santa Fe Ry. Co., 140 I.C.C. 171, 180 (1927).

On appeal to the Ninth Circuit, the ICC again asserted that it had reserved the right to modify its finding when it made the original rate prescription and that it did not have all the record evidence before it in the original proceeding. *Atchison, Topeka & Santa Fe R. Co. v. Arizona Grocery Co.*, 49 F.2d 563, 565-66 (9th Cir. 1931). The Ninth Circuit rejected that contention. "The statute does not authorize or suggest the imposition of tentative rates pending an investigation or of rates pendente lite in an investigation." *Id.* at 566. Speaking of the ICC's 1921 rate prescription, the court stated: "its effect is quite as final, it is a legislative fiat, good, if constitutional, in all courts and at all times until changed by the Legislature." *Id.* at 568.

Before this Court, the ICC repeated its argument that the original rate was only tentative and not based upon a complete record. Specifically, the ICC asserted that "there was constant agitation about the rates" and that "the question of reasonableness of the rates involved" was not "presented fully" until the final order.[9] This Court rejected that argument, holding that once the agency has "declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same *or additional evidence* as to the fact situation existing when its previous order was promulgated," change those findings. 284 U.S. at 390 (emphasis added).

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[9] Brief of the Interstate Commerce Commission as *Amicus Curiae*, at 19-21 (filed Nov. 10, 1932) (Docket No. 98) (citing *Traffic Bureau of Phoenix Chamber of Commerce v. Atchison, Topeka & Santa Fe Ry. Co.*, 140 I.C.C. at 180).

This Court's reasoning turned on the effect of a Commission-prescribed rate. The Court explained that once the Commission prescribes a rate "to be thereafter observed," it acts in a legislative capacity. *Id.* at 387. The Commission establishes, in the same manner as if the Congress itself had enacted a specific statute, what the lawful rate will be. *Id.* The carrier's compliance with that legislative determination cannot be a violation of the Act giving rise to reparations or refunds. *Id.* at 387-89. A corollary of the distinction between adjudicative and legislative functions is that the Commission, in its judicial role, was *itself* bound by its own prior legislative decisions. Thus, the Court explained, the Commission cannot modify its previous findings and give retroactive effect to that modification; any change in the rate can be prospective only. "Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi judicial capacity, ignore its own pronouncement promulgated in its quasi legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." *Id.* at 389.

This Court has adhered to the *Arizona Grocery* rule in subsequent cases. *See ICC v. Inland Waterways Corp.*, 319 U.S. 671, 686-87 (1943); *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 312 nn.13-14 (1975). *Arizona Grocery* has been zealously guarded by decisions of the federal courts of appeal, which have repeatedly rejected attempts by agencies to order reparations from rates a carrier filed pursuant to a prescription order. *See, e.g., Natural Gas Pipeline Co. of America v. FERC*, 590 F.2d 664, 668 (7th Cir. 1979) (*Arizona Grocery* held ICC "was bound to recognize the validity of the rule of conduct proscribed by it, and that it could not repeal its own enactments with retroactive effect"); *Continental Oil Co. v. FPC*, 378 F.2d 510, 530 (5th Cir. 1967) (because FPC's powers were "quasi legislative and therefore prospective in application" it could not "impose

such a refund condition [in a temporary certificate] by awarding reparations of amounts previously collected by the Producers"); *Arizona Wholesale Grocery Co. v. Southern Pac. Co.*, 68 F.2d 601 (9th Cir. 1934) (ICC finding a rate to be "not unreasonable" required reversing ICC's subsequent award of retroactive reparations).[10] By permitting retroactive reparations in the same circumstances, the court below put itself in direct conflict with *Arizona Grocery* and its progeny.

There was no need for it to do so. *Arizona Grocery* gives the agency a clear and simple choice. It can wait to prescribe rates until completing its proceedings, during which time complaining shippers are fully protected by the availability of reparations up to the date of prescription. Or it can prescribe lower rates applicable to all shippers but thereby cut off retrospective relief for both complainants and others. Here, however, FERC sought to have it both ways, sacrificing the order that *Arizona Grocery* imposed. The court of appeals erred in affirming that outcome.

Arizona Grocery has long been a fundamental tenet of federal rate regulation, to which Congress has acquiesced for more than seven decades. As a consequence, *Arizona Grocery* has governed thousands of rate prescription cases; regulators, regulated companies and their customers have come to rely upon it as settled law. The objectives of *stare decisis* are magnified in these circumstances. Indeed, as this Court has observed, in this context "it is more important that the applicable rule of law be settled than that it be settled right." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*,

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[10] The decision below is also a marked departure from D.C. Circuit law. *See Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 189 n.7 (D.C. Cir. 1986) (the Commission "may not order a retroactive refund based on a post hoc determination of the illegality of a filed rate's prescription"); *United States v. Davidson Transfer & Storage Co., Inc.*, 259 F.3d 802, 806 (D.C. Cir. 1958), *rev'd on other grounds sub nom. T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959).

476 U.S. 409, 424 (1986).[11] Unless this Court swiftly and authoritatively reaffirms *Arizona Grocery*, that longstanding predictability and certainty in this important area of the law will be lost.

B. The Decision Below Conflicts With The Interstate Commerce Act

Arizona Grocery was grounded on the plain language of the Interstate Commerce Act, which has remained unchanged. *See Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 362-63 (1932) (explaining *Arizona Grocery* "plants itself upon the statute, and from that source and no other derives its energy"); *see also Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 641 (1944) (Rutledge, J., dissenting). The decision below thus conflicts with the ICA itself as well as this Court's definitive interpretation of it.

The Act was carefully constructed by Congress to preserve the carrier's freedom to file rates, because the carrier is the owner of the regulated assets. "The Act was designed to preserve private initiative in rate-making as indicated by the duty of each common carrier to initiate its own rates." *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439, 459 (1945). As a result, the contents of the tariff are in the first instance the product of the carrier's independent business judgment. *See Aberdeen & Rockfish R.R. Co.*, 422 U.S. at 311.

In authorizing the agency to prescribe rates in limited circumstances, Congress traded the common carrier's freedom to set its own rates for the certainty that a carrier charging agency-prescribed rates will have repose. To provide that certainty, Congress constructed the Act so that the

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[11] In *Square D*, this Court noted that it is "especially reluctant" to set aside a previous interpretation of a statute "in an area that has seen careful, intense, and sustained congressional attention," as is the case with the ICA. 476 U.S. at 424.

Commission's remedial power is strictly limited to *prospective* relief once the carrier has filed rates in compliance with a prescription order.

Congress accomplished that objective through several ICA provisions. FERC's jurisdiction under the ICA is limited to determining—if it decides the existing rate is unjust and unreasonable—"the just and reasonable rate . . . to be *thereafter* observed." 49 U.S.C. § 15(1) (emphasis added). FERC has no power to prescribe anything other than a just and reasonable rate when it corrects an unlawful rate. *See* 49 U.S.C. § 1(5); *Southern Pac. Co. v. ICC*, 219 U.S. 433, 443-44 (1911).[12] Moreover, FERC's power to award damages can only be exercised where a violation of the Act has occurred. 49 U.S.C. §§ 8, 16(1).[13] And when complying with rate prescriptions, carriers cannot be in violation of the Act because they are bound to comply with all FERC orders, and rate prescriptions in particular have the force of a statute.[14]

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[12] *See also Brimstone R.R. & Canal Co. v. United States,* 276 U.S. 104, 109 (1928); *Atlantic City Elec. Co. v. FERC,* 295 F.3d 1, 10 (D.C. Cir. 2002) (construing parallel provision in the Federal Power Act); *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (construing parallel provision in the Natural Gas Act).

[13] *See New Pittsburgh Coal Co. v. H.V. Ry. Co.*, 26 I.C.C. 121, 126 (1913) ("There can be no doubt, we think, that we are without authority to award reparation in any case unless we can conclude that the rate assailed was in violation of the act at the time the shipments in question moved."); *Pittwood v. N.P. Ry. Co.*, 51 I.C.C. 535, 535 (1918) ("This Commission has power to award damages only when they are suffered in consequence of a violation of the act to regulate commerce.").

[14] *Arizona Grocery,* 284 U.S. at 386-87; *see also* 49 U.S.C. § 10(1); *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987) (carriers are compelled to adhere to prescriptions by Commission); *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865, 874 (2d Cir. 1973) (same).

Thus, the ICA ratemaking scheme strikes a careful balance. When a carrier charges a self-made rate, it is exposed to a certain quantum of damages; when it charges a rate set by the Commission, the rate is fixed prospectively and the pipeline is not subject to such damages. Or, as this Court has explained, "To prescribe the new rates [is] to cut off refund claims by injured shippers." *Aberdeen & Rockfish R.R. Co.*, 422 U.S. at 312 n.14. "[A] shipper may always obtain a refund" of unreasonable charges "*[u]nless* the ICC has previously exercised its ancillary power to set rates, or prescribe their maxima or minima." *Id.* at 312 n.13 (emphasis added).[15]

FERC has now destroyed this statutory balance. It set aside the carrier-made rates, but at the same time held the carrier liable in damages for rates that the agency set. FERC tried to circumvent the statutory scheme by suspending each rate it had ordered the carrier to file, claiming that the rate prescriptions were not a "final" determination on what the maximum reasonable rate should be. Not surprisingly, FERC was unable to cite a single case in the long history of the ICA that supports this approach, either in its opinions or even belatedly on appeal. The D.C. Circuit also failed to cite a single case in which reparations or other retrospective damages were awarded for charges collected pursuant to a prescribed rate.[16] In any event, it is clear from the Act

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[15] *See also ICC v. Inland Waterways Corp.*, 319 U.S. 671, 686-87 (1943) ("Since the Commission refused to approve or prescribe them, they stand only as carrier-made rates which . . . leaves them open to possible recovery of reparations.").

[16] In concluding FERC has authority to prescribe a rate subject to further retroactive relief, the court of appeals cited *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978). *Trans Alaska* is not on point. There, the Court held that the ICA granted the agency authority to suspend initial *carrier-made* rates on a newly-constructed pipeline. *Id.* at 651. The Court also held that the agency had authority to advise the pipeline what

that Congress affirmatively did not intend to give FERC this authority

The decisions below also severely undermine the repose and fairness that Congress embodied in the ICA. As this Court explained, limits on the ability to relitigate decisions setting rate levels are consistent with the goal of the ICA to "render rates definite and certain." *Arizona Grocery*, 284 U.S. at 384. The Federal Communications Commission more recently observed: "the lessons of *Arizona Grocery* and its progeny come down to this: as a matter of fairness to carriers, where the regulatory agency after investigation finds that carrier initiated rates are lawful or prescribes its own rates, those rates will not subject the carrier to damages." *MCI Telecomm. Corp. v. American Telephone & Telegraph Co.*, 85 F.C.C.2d 994, at ¶ 21 (1981). This Court, too, has acknowledged the fairness considerations underlying the *Arizona Grocery* rule.[17] FERC has abandoned these principles by subjecting carriers to both increased uncertainty and increased liability.

The unfairness is particularly evident in this case. When SFPP's own, carrier-made rates were in effect, it was only potentially liable for reparations to those shippers that actually filed complaints with the Commission. When FERC ordered SFPP to file reduced rates and then suspended them, SFPP became liable in damages to *all* shippers on the East Line, rather than only the complaining shippers, in the event

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carrier-made rate it would *not* suspend, *id.* at 652-53, and the authority to order refunds from those *carrier-made* rates, *id.* at 656-57.

[17] *See, e.g., United States v. Caceres*, 440 U.S. 741, 753 & n.15 (1979) (including *Arizona Grocery* as a case in which reasonable reliance on agency regulations triggered fairness concerns); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 624 n.25 (1966) (recognizing that equitable concerns are implicated where "a litigant affirmatively relies upon an agency declaration, later reversed, that specifically authorized particular behavior") (citing *Arizona Grocery*).

of further rate reductions. SFPP was thus placed in the worst of both worlds, directly contrary to the statutory scheme.

In short, FERC's invention of "interim" prescription powers is without statutory foundation. By acting ultra vires, FERC violated the constitutional separation-of-powers doctrine. *See United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) ("An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside.") (citing 5 U.S.C. § 706(2)(C) (1994)); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979) (regulations must be struck down unless reviewing court is "reasonably [] able to conclude that the grant of authority contemplates the regulations issued"); *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are 'ultra vires,' and courts must invalidate them."). FERC has arrogated new authority that no court has previously suggested Congress intended to grant. A definitive articulation of the limits of FERC's powers is therefore necessary here.

II. THIS CASE IS VITALLY IMPORTANT TO THE OIL PIPELINE INDUSTRY AND OTHER RATE-REGULATED INDUSTRIES

Whether FERC has authority to order reparations or refunds for shipments made under a prescribed rate is a question of recurring importance to the oil pipeline industry. The issue arises whenever a rate prescription is ordered, and potentially—and unlawfully—subjects pipeline carriers to millions of dollars in liability.

Unless corrected by this Court, the D.C. Circuit's departure from *Arizona Grocery* will have serious adverse effects on the oil pipeline industry. The decision below not only blurs

the statutory distinction between carrier-made and Commission-made rates, but also undermines stability in rate prescriptions and adds the administrative burden of continued rate litigation. It also creates incentives for agencies to issue "half-baked" rate prescription orders—that is, to make a less than thorough analysis prior to prescribing a rate and then attempt to improve it later. That is neither fair to carriers nor sensible rate regulation policy. There is no evidence that Congress intended the powers it delegated to be exercised in such a manner. Review is warranted to bring FERC and the D.C. Circuit back into line with this Court's precedents.

The decisions below will have a serious impact on a wide range of regulated industries. The ICA was the forerunner of other regulatory statutes and has served as the model for rate regulation laws governing a broad range of critical industries.[18] If allowed to stand, the decision below may well embolden other agencies to engage in similar *ad hoc* departures from governing statutes and precedent.

Indeed, other agencies may already be attempting to evade *Arizona Grocery*. In *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1348 (D.C. Cir. 1999), the FCC prescribed an "interim rate" that was subject to "a two-way adjustment mechanism: carrier recoupment if the FCC found at the end of the investigation that the interim rates were below a just and reasonable level, and refunds to customers if the FCC finally concluded that the interim rates were too high." The court of appeals expressed "strong doubts that the FCC acted within its statutory authority," *id.* at 1350, but dismissed the petition as moot, *id.* at 1352. *See also Arizona Pub. Service Co. v. Burlington Northern and Santa Fe Ry. Corp.*, 2003

[18] As this Court has observed, the ICA "served as [a] model" for such statutes as the Federal Communications Act, 47 U.S.C. § 151, *et seq.*, the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, and the Federal Power Act, 16 U.S.C. § 791, *et seq.* *See MCI Telecomm. Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994).

STB LEXIS 639, at *4 n.4 (2003) (reciting that "the Board removed the prescriptive effect of the prior rate order, but directed the carrier to maintain the previously prescribed rate").

Regulated firms in the critical energy sector, and other rate-regulated industries, need to know if the agency has the power to order retroactive relief. They cannot plan for the future if they do not know their potential liability for the past. Certiorari is warranted to remove this cloud of unforeseeable retrospective liability and to restore the clear statutory rules that Congress established for rate-regulated companies.

The problems created by FERC and the court of appeals below are highlighted by contrasting the lot of carriers with that of shippers who are denied reparations. In *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959), this Court held there was no cause of action for reparations by a shipper who had paid unreasonably high rates for motor carriage.[19] In responding to a contention that its holding allowed injustice, the Court noted that shippers may pass overcharges through to their customers. *Id.* at 479 n.19. When there is such a pass-through, the shipper suffers no economic harm, it becomes burdensome to identify the individual who actually was harmed, and the harm is diffused among many customers. In contrast, when a carrier faces a retroactive order of reparations, it cannot simply pass the cost along. For one thing, the reparations relate to shipments that have already moved. For another, the carrier can charge no more than the prescribed maximum rate. The injustice that occurs when a carrier is inappropriately exposed to reparations is thus significantly and disproportionately greater than that for a shipper denied a reparations remedy.

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[19] Congress responded to this Court's interpretation of the statute by providing such a cause of action. *See Duffy v. BMC Indus., Inc.*, 938 F.2d 353, 357 (2d Cir. 1991).

Carriers, of course, also have an interest in being able to rely upon agency determinations.[20] This Court has long recognized that legislatures often conclude the virtues of repose outweigh those of litigating a case to conclusion on the merits. *See Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("[I]n the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred . . . ."). Although delay by the plaintiff is not the cause here, the effect is the same: the ability to rely on settled expectations has been materially harmed by the decision below. That decision unmistakably has harmed pipeline carriers—and potentially other regulated industries—by exposing them to uncertain financial and business risks, and eliminating their ability to rely on compliance with agency mandates.

In short, this Court needs to reassert the fundamental rules of ratemaking established by *Arizona Grocery*. The D.C. Circuit's decision below is flatly inconsistent with the principles set forth in *Arizona Grocery* and its progeny. It allows the agency to circumvent *Arizona Grocery*'s long settled rule by claiming that its original rate prescription was tentative and not final. Unless promptly corrected by this Court, the longstanding congressional scheme for rate regulation will be seriously undermined and the statutory balance between carrier-made and agency-made rates will be destroyed.

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[20] *Cf. Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 624 n.25 (1966) (finding sufficient equity to affirm reparations against a carrier when there were two agency decisions *condemning* carrier's action; distinguishing the situation in which a carrier relied on an agency decision "specifically *authoriz[ing]* particular behavior" even if the agency was later reversed) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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